

CASE NO.:
Appeal (civil) 288 of 2003

PETITIONER:
ACHALDAS DURGAJI OSWAL (DEAD) THROUGH LRS.

RESPONDENT:
RAMVILAS GANGABISAN HEDA (DEAD) THROUGH LRS. & ORS.

DATE OF JUDGMENT: 15/01/2003

BENCH:
V.N. KHARE CJ & S.B. SINHA & DR. AR. LAKSHMANAN

JUDGMENT:
JUDGMENT

2003 (1) SCR 340

The Judgment of the Court was delivered by

S.B. SINHA, J. Leave granted.

This appeal is directed against a judgment and order dated 9th November, 2001 passed by a learned Single Judge of the Bombay High Court in Civil Revision Application No. 310 of 1998 whereby and whereunder he allowed the revision application filed by the respondent herein questioning an order dated 17th October, 1990 passed by the Joint Civil Judge, S.D. Kolhapur in final decree proceeding registered as Application No. 21 of 1975 rejecting an application purported to be under Order XXXIV, Rule 8 of the Code of Civil Procedure (C.P.C. for short) for preparation of final decree in Special Civil Suit No. 78 of 1969 wherein preliminary decree was drawn on 18th January, 1972 on the ground that the same was barred by limitation.

FACTS:

The property in suit is a building bearing City Survey No. 281 situated at Ward B, in the town of Kolhapur. Admittedly, Pandit Govind Shinde Naik, the owner of the property, mortgaged the same with Achaldas Oswal (Original Defendant No. 1 since deceased for a period of five years. The mortgage was an usufructuary one. As the dues in relation to the suit property was not repaid by Pandit G.S. Naik to Kolhapur Bank, the property was sold in auction which was purchased by the first respondent herein. He filed a suit marked as Special Civil Suit No. 78 of 1969 inter alia for redemption of mortgage wherein a preliminary decree was passed on 18th January, 1972; the operative portion whereof reads thus:-

"The plaintiff shall deposit into Court the mortgaged money amounting to Rs. 11,000 within three months on or before 17.4.1972.

The amount of expenses proportionately incurred by the mortgage or defendant no, 1 to the above debt in respect of the mortgage security including the payment of Municipal taxes and refers to the mortgaged property together with interest be taken through Commissioner. The plaintiff shall apply for appointment of the Commissioner in this respect in final decree proceedings.

Order regarding possession of the suit property and cost of the suit would be passed in final decree. The preliminary decree be drawn accordingly." Within the stipulated time, namely, on or about 17th April, 1972, the said sum of Rs. 11,000 was not deposited by the plaintiff-Respondent No.1.

He, however, filed an application marked as Misc. Application No. 85 of 1972 for extension of time to make the payment as directed in the

preliminary decree, which was rejected by order dated 30th January, 1975. Although the said order was not challenged by the plaintiff, he obtained the permission to make necessary deposit which was complied with by the plaintiff on or about 6th February, 1975. The said order, however, was passed without prejudice to the rights of the parties. Within a period of three years from the said date, namely, 6th February, 1975, the first respondent filed an application for preparation of a final decree. An objection thereto was filed by the original defendant no.1, inter alia, on the ground that the same was not maintainable as being barred by limitation. In the said objection it was also contended out that the respondent's application for extension of time having been dismissed by the court by the said order dated 30th January, 1975, the said proceeding was not maintainable. The learned Civil Judge accepting the plea of the appellant herein that the said application was barred by limitation dismissed the said application for preparation of a final decree. Aggrieved by and dissatisfied therewith, the first respondent herein filed a revision application before the Bombay High Court which, as noticed hereinbefore, was allowed by the impugned judgment holding that there is no period of limitation for filing an application for preparation of a final decree in respect of redemption of usufructuary mortgage.

Submissions:

Mr. V.A. Bobde, learned senior counsel appearing on behalf of the appellant herein, would submit that the High Court committed a manifest error in arriving at the said findings insofar as it failed to take into consideration that the provisions of the C.P.C. and in particular Order XXXIV Rule 7 read with Rule 8 thereof cannot supersede Article 137 of the Limitation Act, 1963. The learned counsel would contend that having regard to the plain language used in Order XXXIV Rule 8 C.P.C. read with Article 137 of the Limitation Act, there cannot be any doubt whatsoever that the period of limitation as prescribed therein shall apply in an application for preparation of a final decree in a suit of redemption of usufructuary mortgage. It was contended that the provisions of the Limitation Act are applicable in such a suit independent of the provisions of the C.P.C. Strong reliance in support of the said contentions was placed in K. Parameswaran Pillai Dead v. K. Sumathi alias Jesis Jessie Jacqueline and Anr., [1993] 4 SCC 431 and Mohd. Abdul Khader Mohd. Kastim and Anr. v. Pareethij Kunju Sayed A hammed and Ors. [1996] 11 SCC 83.

Mr. Mohta, learned senior counsel appearing on behalf of the respondents on the other hand, would submit that whereas Order XXXIV Rule 7 would apply both in respect of the suit for foreclosure and redemption of mortgage, Order XXXIV; Rule 8 thereof refers to final decree in redemption suit only. The learned counsel would contend that having regard to the well-established rule "Once a mortgage always a mortgage", the right of a mortgagor to redeem the mortgage would continue unless the same is extinguished either by reason of a decree passed by a court of law by an agreement of parties. The learned counsel pointed out that in this case the application for drawing up of a final decree was filed within a period of three years from the date of making the deposit and thus the same was not barred by limitation.

Findings:

Usufructuary mortgage is defined in Section 58(d) of the Transfer of Property Act in the following terms:

"Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgage property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is

called an usufructuary mortgage and the mortgagee an usufructuary mortgagee."

Mortgagor despite having mortgaged the property might still deal with it in any way consistent with the rights of the mortgagee. He has an equitable right to redeem the property after the day fixed for payment has gone by but his right or equity of redemption is no longer strictly an equitable estate or interest although it is still in the nature of an equitable interest. (See Halsbury's Laws of England, 4th edition Volume 32 page 264)

The right of the mortgagor, it is now well-settled, to deal with the mortgaged property as well as the limitation to which it is subject depends upon the nature of his ownership which is not absolute, but qualified by reason of the right of the mortgagee to recover his money out of the proceedings. The right to redeem the mortgage is a very valuable right possessed by the mortgagor. Such a right to redeem the mortgage can be exercised before it is foreclosed or the estate is sold. The equitable right of redemption is dependent on the mortgagor giving the mortgagee reasonable notice of his intention to redeem, and on his fully performing his obligations under the mortgage.

The doctrine of redemption of mortgaged property was not recognised by the Indian courts as the essence of the doctrine of equity of redemption was unknown to the ancient law of India. The Privy Council in *Thombuswami v. Hossain* 21A 241; ILR (1875) 1 Mad, 1 called upon the legislature to make a suitable amendment which was given a statutory recognition by reason of Section 60 of the Transfer of Property Act which reads thus:-

"Right of mortgagor to redeem.-At any time after the principal money has become due, the mortgagor has a right on a payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgement in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

Provided that the right conferred by this section has not been extinguished by act of the parties or by decree of a court.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgage shall be entitled to reasonable notice payment or tender of such money."

A right of redemption, thus, was statutorily recognized as a right of a mortgagor as an incident of mortgage which subsists so long as the mortgage itself subsists. The proviso appended to Section 60, as noticed hereinbefore, however, confines that said right so long as the same is not extinguished by act of the parties or by decree of court.

In the Law of Mortgage by Dr. Rashbehary Ghose at page 231-232 under heading 'Once a mortgage, always, a mortgage' it is noticed.

"In 1681 Lord Nottigham in the leading case of *Harris v. Harris* firmly laid down the principle: Once a mortgage, always a mortgage'. This is a doctrine to protect the mortgagor's right of redemption: It renders all agreements in a mortgage for forfeiture of the right to redeem and also incumbrances

of or dealings with the property by the mortgagee as against a mortgagor coming to redeem. In 1902 the well-known maxim, 'once a mortgage, always a mortgage', was supplemented by the words 'and nothing but a mortgage' added by Lord Davey in the leading case *Noakes v. Rice*, in which the maxim was explained to mean 'that a mortgage cannot be made irredeemable and a provision to that effect is void.' The maxim has been supplemented in the Indian context by the words 'and therefore always redeemable', added by Justice Sarkar of the Supreme Court in the case of *Seth Ganga Dhar v. Shankarlal*.

It is thus evident that the very conception of mortgage involves three principles. First, there is the maxim: 'Once a mortgage, always a mortgage'. That is to say, a mortgage is always redeemable and if a contrary provision is made, it is invalid. And this is an exception to the aphorism, *modus et conventio vincunt legem* (custom and agreement overrule law). Secondly, the mortgage cannot reserve to himself any collateral advantage outside the mortgage agreement. Thirdly, as a corollary from the first another principle may be deduced, namely, 'once a mortgage, always a mortgage, and nothing but a mortgage'. In other words, any stipulation which prevents a mortgagor from getting back the property mortgaged is void. That is, a mortgage is always redeemable.

The maxim 'once a mortgage always a mortgage' may be said to be a logical corollary from the doctrine, which is the very foundation of the law of mortgages, that time is not of the essence of the contract in such transactions; for the protection which the law throws round the mortgagor might be rendered wholly illusory, if the right to redeem could be limited by contract between the parties. Right to redeem is an incident of a subsisting mortgage and is inseparable from it so that the right is co-extensive with the mortgage itself. The right subsists until it is appropriately and effectively extinguished either by the acts of the parties concerned or by a proper decree of the competent court.

In 'The Law of Mortgages' by Edward F. Cousins at Page 294, in relation to protection of the right to redeem, it is stated:-

"But the protection of embarrassed mortgagors could not be achieved by the mere creation of the equitable right of redemption. As soon as the practice in equity to allow redemption after the contract date became known, mortgages sought to defeat the intervention of equity by special provisions in the mortgage deed. These provisions were designed either to render the legal right to redeem illusory, and thus prevent the equity of redemption from arising at all, or to defeat or clog the equity of redemption after it had arisen. For example, the mortgage contract might provide for an option for the mortgagee to purchase the mortgaged property, thus defeating both the legal and equitable right to redeem, or might allow redemption after the contract date only upon payment of an additional sum or upon performance of some additional obligation. Consequently, the Chancellor began to relieve mortgagors against such restrictions and fetters on the legal and equitable rights to redeem imposed by special covenants in the mortgage.

The protection of a mortgagor against all attempts to defeat or clog his right of redemption involved the creation of subsidiary rules of equity, invalidating the various contrivances which ingenious conveyancers devised.

These rules are sometimes summed up in a maxim of equity "once a mortgage always a mortgage." This means that once a contract is seen to be a mortgage no provision in the contract will be valid if it is inconsistent with the right of the mortgagor to recover his security on discharging his obligations. Provisions offending against the maxim may either touch the contractual terms of redemption, rendering the right to redeem illusory, or they may touch only the equitable right to redeem after the passing of the contract date, hampering the exercise of the right. Provisions of the latter kind are terms "clogs" on the equity of redemption. *Greene M.R.* in

Knightbridge Estates v. Byrne, emphasized that provisions touching the contractual right to redeem are not properly to be classed as clogs on the equity of redemption, But it is evident that such provisions are in substance clogs on the equity of redemption, since they tend to defeat it altogether."

In 'Fisher and Lightwood's Law of Mortgage', the nature of the right of redemption is stated thus:-

"The rights of redemption. The right to redeem a mortgage was formerly conferred on the mortgagor by a proviso or condition in the mortgage to the effect that, if the mortgagor or his representative should pay to the mortgagee the principal sum, with interest at the rate fixed, on a certain day, the mortgagee, or the person in whom the estate was vested, would, at the cost of the person redeeming, reconvey to him or as should direct (a). This is still the practice in the case of a mortgage effected by an assignment of the mortgagor's interest (b). A proviso for reconveyance was no longer appropriate after 1925 for a legal mortgage of land (which has to be made by demise (c)), and it is not necessary to have a proviso for surrender of the term in such a mortgage, since the term ceases on repayment (d). Nevertheless, in order to define the rights to the mortgagor and the mortgagee, a proviso is inserted expressly stating that the term will cease the date fixed (e).

It has been seen (f) that, at law, whatever, form the mortgage took, upon non-payment by the appointed time, the estate of the mortgagee became absolute and irredeemable, but that equity intervened to enable the mortgagor to redeem after the date of repayment.

There are, therefore, two distinct rights of redemption-the legal or contractual right to redeem on the appointed day and the equitable right to redeem thereafter (g). The equitable right to redeem, which only arises after the contractual date of redemption has passed, must be distinguished from the equity of redemption, which arises when the mortgage is made (g)."

The question which falls for consideration in this appeal must be considered keeping in view the statutory right of the mortgagor in terms of Section 60 of the Transfer of Property Act. By reason of Article 61 of the Limitation Act, 1963, the limitation provided for a suit to redeem or recover the possession of immovable property mortgaged by a mortgagor is thirty years from the date of accrual of right to redeem or recover possession. Article 137 which is a residuary provision provides for limitation of three years in a case where no period of limitation is provided.

Order XXXIV of the C.P.C. deals with suits relating to mortgages of immovable property. Rule 7 thereof deals with preliminary decree in redemption suit. Sub-clause (i) of clause (c) of Rule 7 of Order XXXIV empowers the court to direct as under:-

"(i) that, if the plaintiff pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under clause (a), or from the date on which such amount is declared in Court under clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in rule 10 together with subsequent interest on such sums respectively as provided in rule 11, the defendant shall deliver up to the plaintiff, or to such person as the plaintiff appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the plaintiff at his cost free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall, also, if necessary put the plaintiff in possession of the property; and"

The consequence for non-payment has been contained in sub-clause (ii) of clause (c) which is in the following terms:-

(ii) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the plaintiff fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charge, expenses and interest, the defendant shall be entitled to apply for a final decree

(a) in the case a mortgage other than a usufructuary mortgage, a mortgage by conditional sale, or an anomalous mortgage the terms of which provide for foreclosure only and not for sale, that the mortgaged property be, sold, or

(b) in the case of a mortgage by conditional sale or such an anomalous mortgage as aforesaid that the plaintiff be debarred from all right to redeem the property."

A bare perusal of the aforementioned provisions would clearly show that sub-clause (ii) has no application in relation to usufructuary mortgage. Sub-rule (2) of Rule 7 of Order XXXIV empowers the court to extend the time fixed for payment. Rule 8 of Order XXXIV provides for final decree in redemption suit. The right of the mortgagor to file an application for passing a final decree has been provided in the manner laid down therein.

The statutory provisions, as noticed hereinbefore are required to be construed having regard to the redeeming features of usufructuary mortgage, namely, (a) there is a delivery of possession to the mortgagee, (b) he is to retain possession until repayment of money and to receive rents and profits or part thereof in lieu of interest, or in payment of mortgage money, or partly in lieu of interest and partly in payment of mortgage money (c) There is redemption when the amount due is personally paid is discharged by rents or profits received (d) there is no remedy by scale of foreclosure.

Order XXXIV Rules 7 and 8 do not confer any right upon the usufructuary mortgagee to apply for final decree which is conferred on mortgagee on other types of mortgages. By reason of sub-rule (1) of Rule 8 of Order XXXIV, a mortgagor is entitled to make an application for final decree at any time before a final decree debarring the plaintiff from all right to redeem the mortgaged property has been passed or before the confirmation of a sale held in pursuance of a final decree passed under sub-rule (3) of this rule. No such application is again contemplated at the instance of the usufructuary mortgagee. By reason of sub-rule (1) of Rule 8 of Order XXXIV, a right of redemption is conferred upon the mortgagor of a usufructuary mortgage. Such a provision has been made evidently having regard to the right of redemption of a mortgagor in terms of Section 60 of the Transfer of Property Act and further having regard to the fact that a usufructuary mortgagee would be entitled to possess the property in question till a final decree of redemption is passed.

The right of redemption of mortgagor being a statutory right, the same can be taken away only in terms of the proviso appended to Section 60 of the Act which is extinguished either by a decree or by act of parties. Admittedly, in the instant case, no decree has been passed extinguishing the right of the mortgagor nor such right has come to an end by act of the parties.

A right for obtaining a final decree for sale or foreclosure can be exercised only on payment of such money. Such a right can be exercised at any time even before the sale is confirmed although the final decree might have been passed in the meanwhile. The mortgagee is not also entitled to receive any payment under the preliminary decree nor the mortgagor is required to make an application to recover before paying the same.

Even, indisputably, despite expiry of the time for deposit of mortgaged money in terms of the preliminary decree, a second suit for redemption would be maintainable.

A bare perusal of the provisions of Order XXXIV Rule 7 & 8 would show that despite failure to pay the amount found or declared due by the preliminary decree on or before the date fixed by the Court, the mortgagee-defendant shall be entitled to apply for a final decree under clause c(ii) of rule 7 of Order XXXIV. In a case of a mortgage by conditional sale or anomalous mortgage, the mortgagee can pray for passing of a final decree debarring the mortgagor from claiming his right to redeem the property. In a case of a usufructuary mortgage, however, the mortgagee is not entitled to apply for a final decree. The right of mortgagee to apply for a final decree is provided in sub-clause (3) of rule 8 of Order XXXIV. His application for a final decree must be confined to for declaration that the plaintiff and all persons claiming under him are debarred from all right to redeem the property in the case of a mortgage by a conditional sale or of an anomalous mortgage the terms whereof provide for foreclosure only and not for sale. In the case of the mortgage other than usufructuary mortgage, the mortgagee can file an application to pass a final decree that the mortgaged property or a sufficient part thereof be sold, and the proceeds thereof be paid into Court and applied in payment of what is found due to the defendant, and the balance, if any, be paid to the plaintiff or other persons entitled to receive the same. Sub-rule (1) of Rule 8 shows that only a mortgagor can apply to the Court to pass a final decree on payment of the amount found or declared due under the preliminary decree on making this deposit and upon filing the application as provided for in sub-rule (1) of Rule 8 the mortgagor can request the Court to order the mortgagee to put him in possession of the properties which were the subject matter of the mortgage. The amount determined by the Court which the mortgagor is liable to pay to the mortgagee can be deposited before the right of redeem is lost. It may be noticed that even sub-rule (2) of Rule 7 of Order XXXIV does not apply to the usufructuary mortgage. It may be noticed that by reason of the amendment introduced in 1929 the right conferred earlier on a usufructuary mortgage to bring the property to sale in case of the mortgagor not making the payment within the time fixed in the decree was taken away; As sub-rule (2) of Rule 7 is applicable only in a case of mortgages other than the usufructuary mortgages, a usufructuary mortgagor is not entitled to seek extension of time and in that view of the matter the fact that such an application made by the First Respondent herein was rejected becomes irrelevant.

As regards application of Article 137 of the Limitation Act, the different High Courts have laid down different laws. The Oudh High Court in *Banke Behari Lal and Ors. v. Ghani Ahmad and Ors.*, AIR (1922) Oudh 33 held that Article 181 of the old Limitation Act will have no application. Similar view has been taken in *Ramaiah v. Veeraiah* ILR (1983) 1 Karnataka 114. However, some High Courts have taken a view that the period of limitation provided for under Article 137 starts from the date of deposit. See *Subramaniam Chettiar and Anr. v. Muthiah Pillai* reported in AIR (1957) Madras 189. *Bhagabat Sit v. Balaram Sit* reported in AIR (1963) Ori 61. *Krishnaji Moreshwar Joshi v. Bhakatram Sadashiv Patil and Ors.*, reported in (1998) 2 Kar L.J. 290. *K. Kunjamma and Ors. v. Bhageerathy Amma Gomathy Amma and Ors.*, reported in AIR (1991) Kerala 111, *Angammal v. V.K.M Muhammad Sulaiman* reported in AIR 33 (1946) Madras 38, *Loknath Misir v. Smt. Daulta Kuer* reported in AIR (1953) All 503, *Rudrappa v. Puttalakshamma* reported in AIR 1954 Mysore 118 and *Mahomed Azim v. Md. Sultan* reported in AIR (1946) Pat 99.

A learned Single Judge of the Allahabad High Court in *Yashpal Singh v. Ved Prakash*, (1998) 2 Civil 2 L.J. 356: (1988) All L.J. 594 held (wrongly recorded by the High Court as a judgment of this Court):

"Similar observations have been made in AIR 1946 Pat 99 and in AIR 1954 Mys. 118 *Rudrappa v. Puttalakshamma*, these two cases have also indicated

that a preliminary decree in a suit for redemption of an usufructuary mortgage under clause (c)(i) or rule 7(1) of Order XXXIV of the Civil Procedure Code fix a time for payment of the amount declared due under the decree. But default in making payment of the amount declared under the decree within the time fixed does not operate to debar the plaintiff-mortgagor from all right to redeem the mortgaged property."

In *Mancheri Puthusseri Ahmed and Ors. etc. v. Kuthivattam Estate Receiver*, [1996] 6 SCC 185 it was observed:-

".....It is now well settled that despite the decree for redemption which might have been passed by a competent court and which might have become final till the mortgage amount is deposited by the mortgagor the relationship of mortgagor and mortgagee does not come to an end. Conversely once the amount is deposited by the mortgagor decree-holder even during the execution proceedings the relationship between the parties as mortgagor and mortgagee ceases and thereafter till actual delivery of possession the erstwhile mortgagee-in possession remains merely as judgment-debtor in illegal possession"

In *Mhadagonda Ramgonda Patil and Ors. v. Shripal Balwant Rainde and Ors.*, [1988] 3 SCR 689 AIR = AIR (1988) SC 1200, this Court negatived the plea raised therein that as a final decree was passed in the earlier redemption suit, there was a merger of the mortgage-debt in the decretal-debt and the second suit for redemption was barred would not be sustainable, in the following terms:-

"12. In the instant case, the earlier suit was not a suit for foreclosure nor was either of the mortgages, a mortgage by conditional sale or an anomalous mortgage and, accordingly, there was no declaration in the final decree passed in the earlier suit for redemption that the respondent would be debarred from all right to redeem the mortgaged property, Rule 5(1) of Order XXXIV expressly recognized the right of the mortgagor to redeem the mortgagor at any time before the confirmation of a sale made in pursuance of a final decree passed in a suit for sale. Similarly, Rule 8(1) of Order XXXIV permits the mortgagor to redeem the mortgaged property before the confirmation of the sale held in pursuance of a final decree in a redemption suit, unless such final decree debars the mortgagor from all right to redeem the mortgaged property which, as noticed earlier is provided for in sub-rule (3)(a) of Rule 8 of Order XXXIV relating to a mortgage by conditional sale or an anomalous mortgage. Thus, the provisions of Order XXXIV have laid down in clear terms the circumstances when the right of redemption of the mortgagor would stand extinguished. It is also clear that in a suit for redemption, a mortgage other than a mortgage by conditional sale or an anomalous mortgage, the mortgagor has right of redemption even after the sale has taken place pursuant to the final decree, but before the confirmation of such sale. In view of these provisions, the question of merger of mortgage-debt in the decretal-debt does not at all arise. We are, therefore, of the view that the decision in *Sheo Narain 's*, case AIR (1948) Pat 208 supra, in so far as it lays down the merger of the mortgage-debt in the decretal-debt and the consequent extinguishments of the right of redemption of the mortgagor after the passing of the final decree in a suit for redemption, is erroneous."

This court in *Mhadagonda Ramgonda Paul* (supra) cited with approval the decisions of the Privy Council in *Raghunath Singh v. Mt. Hansraj Kunwar*, AIR (1934) PC 205 as well that of the Federal Court in *Subba Rao v. Raju*, AIR (1950) FC 1.

In *Maganlal etc. v. M/s. Jaiswal Industries, Neemach and Ors.*, [1989] 3 SCR 696 = AIR (1989) SC 2113 this Court following the dicta in *Mhadagonda Ramgonda Patil* supra stated thus:

".....It cannot be disputed that the provisions contained in O. 34 Rule 5 of the Code are attracted as is apparent from the plain language thereof

during the proceedings in execution of a final decree for sale and are thus provisions contained in the Code with regard to and having a material bearing on the execution of a decree as aforesaid. As seen above the provisions contained in O.34 R. 5 of the Code in substance permit the judgment debtor to redeem the mortgage even at the stage contemplated by O.34 R.5 unless the equity of redemption has got extinguished. Since the contingency whereunder an equity of redemption gets extinguished is contained in the proviso to S. 60 of the Transfer of Property Act and since as indicated above, in the instant case the equity of redemption has not extinguish we find no good ground to take the view that even though all the remaining provisions with regard to execution of a decree for sale of mortgaged property will apply to execution of an order under S. 32 of the Act, the provision contained in O. 34 Rule 5 of the Code shall not apply. Nothing has been brought to our notice as to how and why it is not practicable to apply the said provision....."

In Pomal Kanji Govindji and Ors etc. v. Vrajlal Karsandas Purohit and Ors etc., [1988] Supp. 3 SCR 826 = AIR (1989) SC 436, it is stated as under:-

"It is a right of the mortgagor on redemption, by reason of the very nature of the mortgage, to get back the subject of the mortgage and to hold and enjoy as he was entitled to hold and enjoy it before the mortgage. If he is prevented from doing so or is prevented from redeeming the mortgage, such prevention is bad in law. If he is so prevented, the equity of redemption is affected by that whether aptly or not, and it has always been learned as a clog. Such a clog is inequitable. The law does not countenance it."

In Haquik Mian v. Rajendra Prasad and Ors., AIR (1997) Patna 59, it is stated thus:-

".....In other words mortgage is essentially a conveyance of an interest

in a property as a security for payment of debt. The security must be redeemable on payment of debtor mortgage-money; Section 60 of the T.P. Act confers a statutory right of redemption. It is an inviolable right of mortgagor, on redemption to get back the subject of mortgage. Any clog on the equity of redemption was inequitable, bad in law and void. The courts must ignore any transaction or proceeding, as the proceeding for recovery of rent from mortgagor when it was the obligation of mortgagee to pay rent and order or decree obtained ex-parte without any notice and consequential auction sale etc."

In Vora Aminbai Ibrahim v. Vora Taherali Molunedali and Ors., AIR (1998) Gujarat 31 it is stated thus:-

"So far as the second substantial question of law is concerned it would be useful to consider what is redemption and what is scope of a suit for that purpose. "Redemption" presupposes existence of a "mortgage". "Mortgage" as defined in the Transfer of Property Act, is the transfer of an interest in immovable property for the purpose of securing the payment of a loan. A mortgage is created by act of parties. In usufructuary mortgage, the transfer is made of the right of the possession and enjoyment of the usufruct. The rights of a usufructuary mortgage form part of the bundle of rights, which constitute ownership the remainder still remains with the mortgagor and can be transferred by him. On the execution of a mortgage two distinct rights are carved out, namely (i) the mortgagee's right (1) and (ii) the mortgagor's right. The mortgagee's right is the right of security for the respondent of his loan. The mortgagor's right is as indicated in Section 60 of the Transfer of Property Act i.e., after the principal money has become due, the mortgagor has a right to pay the mortgage money and on such payment he has a right to require the mortgagee, among others, to deliver possession. This right cannot be extinguished except by the act of parties or by a decree of a Court. This right is called the right to redeem and a suit to enforce it is called a suit for redemption. Thus, the scope of suit for redemption is primarily to enforce the right to make payment of

the mortgage money. A claim to redeem a mortgage actually does into attach to the land, although the decree passed in that suit may ultimately affect possession which is also an interest in land. An owner has a bundle of interests in property. By executing a mortgage he transfers only some interest to the mortgagee and that also by way of security. That interest is confined to realisation of mortgage debt, which, in the event of non-payment, may be realized out of the said security. What remains with the mortgagor after execution of the mortgage, is the ownership of the property, minus the interest transferred, and the right to repay the mortgage money and to get the burden of security discharged. That right has been created in the mortgagor and not in the property. Thus, when a mortgagor enforces his right to redeem, he does not enforce a right in land."

It was further observed:

"However, there is no manner of doubt that successive suits for redemption of mortgage can be filed till right of redemption is not extinguished. Having regard to provisions of Section 60 of the Transfer of Property Act and Order XXIII, Rule 1 and 2 of the Code of Civil Procedure, it will have to be held that dismissal of earlier suit for redemption whether as abated or as withdrawn or in default would not debar the mortgagor from filing a suit for redemption and that such second suit for redemption to redeem the same mortgage can be brought so long as the mortgage subsists and the right of redemption is not extinguished by efflux of time or by a decree of Court passed in the prescribed form. This is because the right of redemption is an incident of a subsisting mortgage and is inseparable from it so that the right is co-extensive with the mortgage itself. It subsists so long as mortgage itself subsists until it is appropriately and effectively extinguished and the extinguishments of the right of redemption can only happen either by the act of the parties concerned, or by a proper decree of the competent Court. The right of redemption can be extinguished as provided in Section 60 of the Transfer of Property Act and when it is alleged to have been extinguished by a decree the decree should run strictly in accordance with the form prescribed for the purposes."

In *Pranil Kumar Sett v. Kishorilal Bysack* AIR (2003) Calcutta 1 at page 4 it has been stated:

".....Moreover the right of redemption of the mortgagor in a suit for foreclosure subsists till final decree debarring the defendant (mortgagor) from all rights to redeem the mortgage property has been passed."

We are, therefore, of the opinion that although by reason of preliminary decree in the suit for redemption of usufructuary mortgage, the Court may fix the time for payment of the amount declared due but default in depositing such payment would not debar him from a right to redeem the mortgaged property.

In the aforementioned backdrop the decisions of this Court relied upon by Mr. Bobde are required to be considered.

In *K. Parameswaran Pillai's* case (supra) whereupon Mr. Bobde has placed strong reliance, a suit was filed by successors-in-interest of the mortgagee of the usufructuary mortgage. Consequent to subrogation, the appellant became a mere puisne mortgagee and the respondent therein after the preliminary decree transposed herself to be mortgagor. The direction of the court in the preliminary decree was, inter alia, as under:-

"And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendants may apply to the court for a final decree for the sale of the mortgaged property; and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold; and for the purpose of such sale the defendant shall produce before the court or such officer as it appoints all documents in his possession if

power relating to the mortgaged property."

In the a aforementioned situation, a two-Judge Bench of this Court observed as under:-

"In the case of usufructuary mortgage clause (a) of sub-rule (3) of Rule 8 expressly excludes the right to the mortgagee to apply for foreclosure or sale or redemption. Necessary consequence is that so long as the right subsists though there is delay in compliance of the condition imposed in the preliminary decree, the right of redemption to the mortgagor is not lost. It will be barred only on expiry of the period of limitation prescribed under the Limitation Act. The reasons are obvious. Order 34 Rule 8(3) does not give any right to the mortgagee but the right is given only to the mortgagor, to seek redemption of the usufructuary mortgage in a decree under Rule 8(3) of Order 34. The mortgagee, having been in possession and enjoyment of the hypotheca is not disabled by the preliminary decree. On the other hand the liability continues to subsist against the mortgagor. Therefore, it is up to the mortgagor to redeem the mortgage. Till then his liability under the mortgage continues to run on the estate. It is, therefore, clear that the limitation to file an application under Order 34 Rule 8(1) to pass a final decree for redemption, other than the preliminary decree for redemption of usufructuary mortgage, starts running and continues to run its course from the date of expiry of the period fixed in the preliminary decree, unless it is stayed or suspended or the time prescribed in the preliminary decree is extended by an order of the court. In its absence on expiry of the limitation of three years from the date fixed in the preliminary decree expired under Article 137 of the Schedule to Limitation Act, 1963 (Article 181 of Schedule I of Old Act), the plaintiff is debarred to enforce the right to pass the final decree. But in the case of preliminary decree for redemption of usufructuary mortgage no limitation begins to run until deposit is made though there is a conditional preliminary decree and default was committed by the mortgagor for compliance thereof. "

(Emphasis supplied)

This Court, thus, made a distinction on the applicability of limitation as regard initiation of a proceeding for passing a final decree between other types of mortgages and usufructuary mortgage. This Court is no uncertain terms held:-

"The proceeding in the preliminary decree does not get terminated by dismissal of LA. No 58 of 1972, on June 26, 1975 or for non-prosecution, Till date of passing the final decree and its execution or till the remedy is barred by limitation under Article 137 of the Schedule to the Limitation Act 1963 the court has power and jurisdiction to entertain the application to pass the final decree. At any time before the remedy is barred, it is open to the plaintiff to deposit the redemption money under the preliminary decree. The dismissal of the earlier application or non-prosecution, therefore does not per se bar the right of the plaintiff. But if remedy to enforce preliminary decree for the redemption is barred by the limitation, thereafter the right remains unenforceable. The deposit, therefore, is non est and the court cannot proceed to pass final decree as the remedy is lost. Therefore, the mere dismissal of the first application for non-prosecution and withdrawal of the redemption money deposited thereunder per se creates no bar to entertain second application. Equally instead of availing the remedy of depositing the redemption amount in the pending proceedings under Rule 8(1) of Order 34, the respondent instituted an independent suit for redemption. Per force, though it does not operate as bar to maintain the application to pass final decree, court cannot proceed further with the application. Otherwise conflicting decisions would arise giving rise to multiplicity of proceedings. The court would stop to proceed further in the matter. In view of the finding that the application to pass final decree is barred by limitation, the trial court has no jurisdiction to proceed with the application under Rule 8(3) of Order 34 and to pass

final decree. Accordingly, though for different reasons, the decree of the High Court, in the second appeal, is legal and does not warrant interference. The appeal is dismissed but without costs."

The aforementioned decision was, therefore, rendered in the facts of that case and is distinguishable.

In Mohd. Abdul Khader Mohd. Kastim 's case (supra), this Court was concerned with the question as to whether in absence of any time having been fixed by the court passing the preliminary decree directing the appellant to deposit the redemption money, the decree passed in terms of Order XXXIV could be called a preliminary decree at all. This Court examined the preliminary decree and held that the obligation and counter obligation made therein are separate in, nature and by reason thereof the appellant was required to deposit the redemption money of Rs. 18,000 within the statutory period of six months provided under Order XXXIV Rule 7 C.P.C. This Court in the facts of that case had not and could not have laid down a law to the effect that the deposit must be made within a period of six months as otherwise the application for passing a final decree was to become barred by limitation.

In the said case, the contentions raised herein had not been raised obviously because no such question arose for consideration and any passing observation made therein without any argument and without any precedent cannot be treated to be a declaration of law in terms of Article 141 of the Constitution of India.

Any observation made therein contrary to what we have held above cannot be said to be good law and is hereby overruled.

We, therefore, do not find any merit in this appeal which is accordingly dismissed. No costs.